Mailed: March 23, 2004
Paper No. 13
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

Trademark Trial and Appeal Board

_____

In re Euphonic Audio, Inc.

_____

Serial No. 78059702

_____

Ronald S. Bienstock of Bienstock & Michael, P.C., for Euphonic Audio, Inc.

William T. Verhosek, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

_____

Before Cissel, Chapman and Drost, Administrative Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On April 21, 2003, applicant, a New Jersey corporation, filed the above-referenced application to register the mark "EUPHONIC AUDIO" on the Principal Register for "musical instrument amplifiers and components therefore [sic], namely, audio speakers, speaker cabinets, speaker enclosures, sound amplifiers, pre-amplifiers, sound processors and modifiers, namely[,] delay, reverb and

distortion effects boxes, both foot operated and speaker head mounted units," in Class 9. The basis for filing the application was applicant's claim that it had used the mark in commerce in connection with the specified goods since November of 1995. Applicant claimed ownership of three prior United States trademark registrations for unrelated trademarks, disclaimed the exclusive right to use the word "audio" apart from the mark as shown and claimed that the mark has become distinctive within the meaning of Section 2(f) of the Lanham Act.

The first Trademark Examining Attorney[1] refused registration under Section 2(d) the Lanham Act, 15 U.S.C. Section 1052(d), on the ground that the mark applicant seeks to register so resembles the mark "EUPHONIX," which is registered[2] for "professional recording studio electronic equipment and machine interface programs, namely computer-assisted audio mixing systems comprising a mix controller and an audio mainframe, consisting of audio processing modules, controller modules, bar graph meters, audio attenuators, pre-amplifiers, equalizers, auxiliary sends,

[1] The Examining Attorney noted above took over the prosecution of this application after the first Office Action.
[2] Reg. No. 1,576,206, issued on the Principal Register to Euphonix, Inc. on January 9, 1990; a Section 8 affidavit was acceptred, and the registration was subsequently renewed.

faders, bus amplifiers, monitor outputs, headphone amplifiers, test-tone oscillators, talk-back microphones and read-only memories (ROMs)," in Class 9, that confusion is likely. He reasoned that the marks "are essentially phonetic equivalents," and that the goods "are virtually identical because they are all musical instrument[s] and components."

Applicant responded to the refusal to register with argument that confusion is not likely because the marks convey distinct commercial impressions and the goods are not commercially related. While applicant conceded that the goods in the application and the cited registration "involve creating music by using electronic equipment in its most broadest [sic] sense, Registrant's goods contain distinctions as compared to Applicant's goods which further eliminates [sic] a likelihood of consumer confusion between Registrant's mark and Applicant's mark." Applicant went on to distinguish between its products, which it argued allow professional bass guitarists to amplify, distort and add effects to their instruments' sounds during live musical performances, and the goods listed in the cited registration, which applicant characterized as "professional recording studio electronic equipment and

machine interface programs," the same terms used in the registration itself.

Submitted in support of applicant's arguments were exhibits which applicant argued establish that registrant's professional recording equipment and machine interface programs do not move in the same channels of trade as applicant's musical instrument amplification equipment does. Applicant contended that the goods of the registrant are sold in the United States exclusively by direct sales, as opposed to the ordinary musical instrument retail sales channels utilized by applicant. Applicant's exhibits consist of advertisements for both applicant's products and the products of the owner of the cited registration, but they do not establish that the purchasers of the goods listed in the application and the cited registration, respectively, are necessarily different.

The second Examining Attorney was not persuaded by applicant's arguments or evidence. In the second Office Action, he made the refusal to register based on Section 2(d) of the Act final.

Submitted with that Office Action as additional support for the refusal to register were copies of third-party registrations and advertisements and promotional materials the Examining Attorney had retrieved from

Internet sources. The Examining Attorney argued that this evidence establishes that other entities use their marks respective in connection with the marketing of both goods like those specified in the application as well as goods like the products identified in the cited registration. Yamaha, for example, promotes its Digital Audio Workstation mixer as a "professional-quality recording studio that you can use just about anywhere." This Internet advertisement appears to be directed both to musicians and to audio production professionals, given that loudspeakers and reverb units are touted on the same website. On the same web page, Yamaha promotes its powered monitor loudspeakers, amplifiers and commercial audio rack-mounted mixers, which are touted as "ideal for small-to-mid-sized installations, studios, smaller PA systems, broadcast facilities and for touring applications…" Presumably, "touring applications" indicates use by musicians performing on tour. In another promotional piece, Sony Corporation is shown to market professional recording and editing machines as well as speakers, signal processors and amplifiers. Additionally, a company called Struder advertises studio monitor speakers, amplifiers, mixing consoles and digital mixing consoles for use in broadcasting applications and as well as in live performances. The third-party registrations

submitted show that amplifiers, speakers and audio mixer consoles are listed as the goods for which the various registered marks are registered.

Applicant timely filed a Notice of Appeal. Both applicant and the Examining Attorney filed briefs on appeal, but applicant did not request an oral hearing before the Board.

Based on consideration of the record and the written arguments before us in this appeal, we hold that the Examining Attorney has met his burden of establishing that confusion within the meaning of Section 2(d) of the Act is likely.

In the case of E.I. duPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), the predecessor to our primary reviewing court set out the factors to be considered in determining whether confusion is likely. Chief among these factors are the similarity the marks as to appearance, pronunciation, meaning and commercial impression, and the similarity of the goods set forth in the application and registration, respectively.

In the case at hand, the record shows that the goods set forth in the application are commercially related to the goods listed in the cited registration. The mark applicant seeks to register creates a commercial impression

quite similar to the one engendered by the cited registered mark. Under these circumstances, confusion is plainly likely.

Turning first to the marks, we note that greater weight may be given to the dominant feature of the mark in determining whether confusion is likely. Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 189 USPQ 693 (CCPA 1976). The descriptive, and hence disclaimed, term "AUDIO" in the mark applicant seeks to register has no significant source-identifying function in relation to the audio products identified in the application. The dominant portion of that mark is plainly the term "EUPHONIC," which is very similar to the registered mark, "EUPHONIX." "EUPHONIX" is the phonetic equivalent of the plural of "EUPHONIC." The addition of another word to a registered mark is generally insufficient to overcome the likelihood of confusion. See, for example, In re United States Shoe Corp., 229 USPQ 707 (TTAB 1985). This is especially so when the term which is added to the registered mark is merely descriptive of the goods with which it is used. Clearly, these two marks are similar enough that their use in connection with related goods is likely to cause confusion.

We thus turn to examination of the relationship between the goods specified in the application and those set forth in the cited registration. As the Examining Attorney points out, in order for confusion to be likely, they need only be related in some manner, or the conditions surrounding their marketing need to be such that they could be encountered by the same purchaser under circumstances that could give rise to the mistaken belief that the goods come from a common source. In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978).

While we cannot agree that the Examining Attorney's broad generalization that "both goods are musical equipment and components" (brief, p. 5) is sufficient to establish that confusion is likely in the instant case. Applicant's goods are electronic components which amplify music, while the goods set forth in the registration are recording studio electronic equipment and machine interface programs. These products are not necessarily restricted to the field of music, but they are all related to the electronic production or reproduction of sound. The evidence of record nonetheless supports the conclusion that the goods set forth in the registration and those specified in the application are commercially related, in that third parties have used their respective marks on both types of products

and have registered their marks both for the kinds of products applicant sells and for the types of goods for which the registrant has registered its mark. As noted above, the materials submitted by the Examining Attorney show that anyone visiting any of the quoted Internet sites, which of course includes both musicians and audio engineers, has a basis upon which to understand that amplifiers, speakers and sound processing equipment emanate from the same sources which provide electronic recording equipment. Even if the goods listed in the cited registration were only directed to audio engineers, their use of the products bearing the mark would likely be noticed by the musicians who are being recorded. Moreover, in that the application does not limit or restrict the intended users or purchasers of applicant's amplifiers, speakers, sound processors or modifiers, the language used in the application to identify the goods must be interpreted to encompass all such products, including amplifiers, speakers, sound processors and modifiers used by audio recording engineers in connection with their recording studio activities. Thus, the classes of purchasers to whom these goods are marketed overlap.

Based on the evidence of record, we conclude that either musicians or audio engineers who are familiar with

the professional recording equipment sold under the mark "EUPHONIX" are likely, when presented with the mark "EUPHONICS AUDIO" on speakers, amplifiers, reverb and distortion pedals, to assume that a single source is responsible for both.

Decision: The refusal to register under Section 2(d) of the Act is affirmed.